IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U. S.
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October Term, 1979

Nos. 79-1404, 79-1408,
79-1414, 79-1415 and 79-1489

PENNHURST STATE SCHOOL
AND HOSPITAL, *et al.*,

Petitioners

v.

TERRI LEE HALDERMAN, *et al.*,

PENNSYLVANIA ASSOCIATION FOR RETARDED
CITIZENS, *et al.*

and

UNITED STATES OF AMERICA,

Respondents

ON PETITIONS FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS TERRI LEE HALDERMAN, *et al.*

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit *en banc*, dated December 13, 1979, is reported at 612 F.2d 84 (3d Cir. 1979) and appears at 89a *et seq.*[1]

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1. Record references are to the "Joint Appendix" filed by the Commonwealth and County petitioners at Nos. 79-1404, 79-1408 and 79-1415.

The opinion of the District Court, dated December 23, 1977, is reported at 446 F.Supp. 1295 (E.D. Pa. 1977), and appears at 6a *et seq.* The District Court's opinion and judgment of March 17, 1978, reported at 446 F.Supp. 1295 E.D. Pa. 1978), appears at 76a *et seq.*

JURISDICTION

Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1). The decision of the Court of Appeals for the Third Circuit is dated December 13, 1979.

QUESTIONS PRESENTED

1. Is there any basis for review of a purely local law question where the District Court and the Court of Appeals *en banc* reasonably and correctly interpreted dispositive and definitive Pennsylvania statutory and case law providing an enforceable right to habilitation to the retarded?

2. In the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§6000, *et seq.*, did Congress grant retarded people a privately enforceable right to habilitation appropriate to the individual?

3. Where government officials adamantly refuse to remedy their violations of rights and where protection of state and federal statutory rights would otherwise be impossible, does appointment of a master with circumscribed supervisory duties violate principles of federalism?

4. Where a unitary plaintiff class is certified for the purpose of determining liability, and where procedural alternatives to decertification are available to resolve any problem, and where there is no substantial conflict re-

garding plaintiffs' claims, did the Court of Appeals *en banc* abuse its discretion in declining to decertify the class?

STATUTORY PROVISIONS INVOLVED

Pennsylvania Mental Health and Mental Retardation Act of 1966, 50 P.S. §§4101, *et seq.* . . . 225a

Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§6000, *et seq.*[2] 198a

2. The "Joint Appendix" fails to set forth the entire federal statute. However, petitioner in No. 79-1489 has reproduced the entire statute in Appendix D to its petition, at 171a therein.

STATEMENT OF THE CASE

Respondents submit this statement of the case because the petitioners' statements do not discuss the facts, exclude or incorrectly characterize critical portions of the procedural history and misstate the judgment of the lower court.

Introduction. Pennhurst State School and Hospital, near Valley Forge, Pennsylvania, is an institution for the retarded which housed 1230 retarded individuals at the time of trial. 104a. Although divided on the legal standard of care for the retarded, the Court of Appeals *en banc* was unanimous in condemning, in the words of the dissent, the "[u]nderstaffing, filth, violence, enforced inactivity, and other horrors [which] make Pennhurst, in the opinion of one well-traveled expert, one of the worst institutions of its kind in the world." 162a.

"Neither the Commonwealth nor the County defendants take serious issue with the court's findings of fact respecting the abominable conditions to which Pennhurst residents have been subjected," the majority declared. 103a. In this context, the entire court below agreed that "the federal courts have a right and duty to intervene," 162a, and that "improvement of Pennhurst [is] mandatory." 163a. The issue in this case is the extent and nature of the duty to intervene to protect the health, education and well-being of the institutionalized retarded at Pennhurst.

Relying on an independent state statutory ground, the Pennsylvania Mental Health and Mental Retardation Act, and a federal statute, the Developmentally Disabled Assistance and Bill of Rights Act, the Court of Appeals for the Third Circuit held that retarded people have a right to habilitation, a non-medical educational process, in a setting determined on the basis of individual need and that Pennsylvania state and local officials have a statutory duty to implement such habilitation.

Carefully toeing the lines set by the dispositive statutes and decisions of this Court, and in the absence of any conflict with other Courts of Appeal, the Third Circuit's judgment is unremarkable.

Proceedings in the District Court. On May 30, 1974, Terri Lee Halderman, a retarded inmate of the Pennhurst institution, commenced this class action against Pennsylvania state officials alleging, on behalf of all inmates, that they were subject to chronic abuse and neglect, causing physical and intellectual regression, lack of supervision, inhumane and dangerous conditions, and a denial of appropriate non-institutional care. *See* 15a, 94a-95a. Halderman filed a first amended complaint on July 29, 1974, adding as plaintiffs seven other retarded individuals and the Parents and Family Association of Pennhurst, organized in 1967 and representing 200 parents of retarded citizens at Pennhurst. 16a.

The United States was granted leave to intervene as plaintiff on January 17, 1975, its complaint citing the same conditions as the Halderman plaintiffs. 16a, 95a.[3] The Pennsylvania Association for Retarded Citizens (PARC) and several Pennhurst residents were granted leave to intervene November 12, 1975, 16a, and, thereafter, Halderman and PARC amended their complaints to seek relief against those Commonwealth and County defendants who were responsible for commitment of retarded people to Pennhurst and the underuse and lack of structured supervised community facilities. 96a. Violations of constitutional rights were alleged, as were violations of state and federal statutory rights. 96a. The certified class consisted of persons at Pennhurst and those in the local geographical area who might be institutionalized in the facility. 14a, 96a.

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3. Petitions for mandamus, stay and certiorari to prevent United States participation at trial were later denied. 16a, 95a; *Beal v. Broderick*, 431 U.S. 933 (1977).

District Judge Raymond J. Broderick presided over the non-jury trial which began on April 18, 1977 and ended on June 13, 1977, occupying thirty-two court days. 15a. The District Court's opinion issued December 23, 1977, exhaustively finding the facts and holding, on independent alternate grounds, that state and federal statutes, and the United States Constitution, were violated by the petitioners.

After holding them liable, Judge Broderick provided three opportunities for petitioners to submit a plan for vindication of respondents' rights. First, he directed the parties to meet in court to attempt to achieve an acceptable order. 77a-78a. That being unsuccessful, he directed submission of proposed orders. 78a. Finally, he held a hearing to receive any additional evidence on relief. *Id.* On March 17, 1978, the trial court entered its judgment for plaintiffs below, respondents here. 79a *et seq.*

After judgment and after appeals were filed to the Court of Appeals, on April 13, 1978, an organization of Pennhurst employees and parents who favor institutional care sought to intervene. Intervention at that point in time was denied to the Pennhurst Parents-Staff Association.[4]

Proceedings in the Court of Appeals. Defendants in the trial court filed appeals to the Court of Appeals for the Third Circuit, where the case was argued to a panel on January 9, 1979 and to the court *en banc* September 6, 1979.

On December 13, 1979, the Court of Appeals, divided 6-3, affirmed the District Court's determination of liability on state and federal statutory grounds only, and

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4. Intervention was granted to this group for the purpose of participation in formulation of relief, by order of the District Court, dated February 22, 1980.

modified the lower court's decree. 89a *et seq.* It is from this decision that the present petitions for certiorari are filed.[5]

The Judgment of the Court of Appeals. "At the time of trial, Pennhurst housed 1230 mentally retarded individuals, some of whom also suffered from physical disabilities. The residents are not mentally ill, have broken no laws, and are not a danger to others, although, in severe cases, some are unable to care for themselves. Mental retardation is an impairment in learning capacity and adaptive behavior, and is not treatable, like mental illness, by means of drugs or psychotherapy. While the mentally retarded do suffer educational difficulties, the level of their functioning can be improved by individual training." Court of Appeals at 104a.

Pennsylvania's retardation system requires that each retarded person be assigned to a county Base Service Unit "responsible for arranging community and institutional placements and coordinating services for the individual." 45a; *see* 104a. Through their acts and legal obligations, county petitioners are liable for failing to provide services to respondents and for "consigning the mentally retarded to inadequate living conditions." 45a-46a, 104a, 107a, 129a-130a.

In harsh language, the District Court and the Court of Appeals described and condemned the "abominable,"

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5. Petitioners in No. 79-1404 are Pennhurst State School and Hospital and various state officials, collectively referred to as the "Commonwealth petitioners." Petitioners in No. 79-1408 are Philadelphia County officials and those in No. 79-1415 are officials of Bucks, Chester, Delaware and Montgomery Counties, collectively referred to as the "County petitioners." Petitioner in 79-1489 is the Pennhurst Parent-Staff Association.

In No. 79-1414, Pennsylvania Association for Retarded Citizens and three retarded people, plaintiffs below, have filed a conditional cross-petition for certiorari on two limited issues. Respondents Terri Lee Halderman, *et al.*, join in this cross-petition only if the certiorari petitions should be granted.

103a, conditions to which Pennhurst State School and Hospital inmates are involuntarily[6] subjected. 18a-40a, 106a. The dissenting judges in the Court of Appeals similarly stressed the "deplorable conditions" which justify finding Pennhurst "one of the worst institutions of its kind in the world." 162a. Deterioration, regression, physical injuries, sexual assaults, deaths, misuse of dangerous drugs, solitary confinement, inadequate and unavailable programs, outbreaks of infectious disease, urine and excrement in living areas, and general disregard of minimal professional standards characterize the facts of life at Pennhurst. 18a-40a, 106a.

Considering the "shortcomings of institutions as places for habilitation," 155a, and the fact that "[m]any individuals now living at Pennhurst could be moved immediately into the community and would be able to cope with little or no supervision," 43a, the Court of Appeals held that every plaintiff class member has a right to an *individual* assessment of his or her needs and a determination of "the appropriateness of an improved Pennhurst for each such patient." 156a.

Reversing the trial court's orders that Pennhurst be closed and admissions halted, the Court of Appeals stressed that some individuals may require institutional care and held "it is only fitting that the Commonwealth be required to undertake a case-by-case investigation into how each person's rights may best be facilitated." 157a.

In reaching this conclusion, the court below relied on state stututory and case law to find an independent state right to habilitation, 122a-130a, thereby avoiding adjudication of constitutional issues. 108a. The Court of Appeals' decision also found an enforceable federal statutory right to habilitation.

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6. Both courts below found that "the notion of voluntariness in admission and retention" is "illusory." 108a, 40a-41a. Respondents, as a matter of fact, are held involuntarily. *Id.* Petitioners do not challenge this finding.

REASONS THE WRITS SHOULD BE DENIED

I. There is no basis for review of a purely local law question where the district court and the Court of Appeals *en banc* reasonably and correctly interpreted dispositive and definitive Pennsylvania statutory and case law providing an enforceable right to habilitation to the retarded.

Pennsylvania statutory and case law guarantees retarded persons the right to habilitation. The Court of Appeals found that state law provides an independent ground upon which the judgment below firmly rests. In this circumstance, review by this Court would be unprecedented, particularly inappropriate and ineffective.[7]

The state law right to minimally adequate habilitation, recognized by both the district court, 68a-70a, and the Court of Appeals, 122a-130a, has been the basis for decision after decision in the Pennsylvania state courts mandating the provision of appropriate services, in the community if indicated, for retarded persons. *See e.g., In re: Joyce Z.*, 123 Pitt.L.J. 181 (Allegheny Cty. 1975); *In the Matter of Anthony S.*, No. DP 1521-75-11 J 198159

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7. The Court does not appear to have ever accepted for review a case in which state law was dispositive and then to have reversed the interpretation of state law provided by the lower courts. *Cf. Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937) (no state court decision issue; constitutional issue reached); *Elkins v. Moreno*, 435 U.S. 647 (1978) (Court *sua sponte* certified to state court undecided question bearing on state's relations with foreign nations, other states and the federal government.)

Petitioners cite three inapposite cases to support their unprecedented claim that review of the state law decision is necessary. *Murdock v. City of Memphis*, 20 Wall. 590 (1875) (on jurisdiction over judgments of state courts); *Stoner v. New York Life Insurance Co.*, 311 U.S. 464 (1940) (diversity case; federal court must follow state court decision in earlier suit between the same parties on the same question); *Huddleston v. Dwyer*, 322 U.S. 232 (1944) (diversity case; federal court reviewing case on appeal must apply newly decided law).

(May 16, 1977, Philadelphia Cty. Juvenile Court); *In the Interest of Angelo P.*, No. J 194137 (December 6, 1976, Philadelphia Cty.); *In the Interest of Stephanie Lamb*, No. J-184929 (June 30, 1977, Philadelphia Cty.); *In the Interest of Maria O'Hara*, No. 248 Dec. Term, 1976 (April 7, 1977, Philadelphia Cty.); *In the Interest of Edwin Ward*, Nov. Term, 1977 (February 23, 1978 and March 6, 1979, Philadelphia Cty.); *In the Matter of Benjamin Jefferson*, No. 096177, 083977 (November 28, 1978, Chester County); *In the Interest of Moises Santiago*, No. 41-CS-1978 (Chester County); *In the Interest of Mary Alice S.*, No. 75-11919 (April 13, 1976, Delaware Cty.); *In the Interest of Anthony Hariss*, No. 17034 (April 27, 1976, Delaware Cty.); *In the Interest of Carvella Ebron*, No. J-181877 (March 19, 1979, Philadelphia Cty.); *In re Joseph Schmidt*, No. CC 660 (February 13, 1979, Allegheny Cty. Orphans Court); *In the Interest of Kenneth P.*, No. J-204067 (March 6, 1979, Philadelphia Cty.).

The Pennsylvania Commonwealth Court, a statewide court, has recognized that state law requires the availability of adequate retardation facilities. *County of Allegheny v. Commw. Dept. of Public Welfare*, 33 Pa. Commw. Ct. 267, 269, 381 A.2d 1014, 1016 (1978). *See Hoolick v. Retreat State Hospital*, 24 Pa. Commw. Ct. 218, 354 A.2d 609 (1976), *aff'd*, 476 Pa. 317, 382 A.2d 739 (1978). A federal court has found a state statutory right to treatment or release. *Eubanks v. Clarke*, 434 F.Supp. 1022 (E.D. Pa. 1977) (*per* Chief Judge Lord).

It has long been the case that this Court accepts local law determinations by the district courts and circuit courts of appeal:

> In comparable circumstances, this Court has accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion.

Bishop v. Wood, 426 U.S. 341, 346 (1976) (note 10, collecting cases, omitted); *Cort v. Ash*, 422 U.S. 66, 73, n. 6 (1975) ("indeed, our practice of deference to such determinations should generally render unnecessary review of their decisions in this respect."). Sitting in their respective states and "familiar with the intricacies and trends of local law," *Hillsborough v. Cromwell*, 326 U.S. 620, 630 (1930), the views of the lower courts are accorded the greatest deference in this Court[8] and are not disturbed absent "a plain showing of error,"[9] "a definite conviction of error in the conclusion,"[10] or a decision that the lower court is "clearly wrong."[11]

Pennsylvania's Mental Health and Mental Retardation Act of 1966, 50 P.S. §§4101-4704,[12] places on the

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8. *Henderson Co. v. Thompson*, 300 U.S. 258, 266 (1937); *Reitz v. Mealey*, 314 U.S. 33, 39 (1941); *MacGregor v. State Mutual Life Assurance Co.*, 315 U.S. 280, 281 (1942); *Steele v. General Mills*, 329 U.S. 433 (1947); *Gardner v. New Jersey*, 329 U.S. 565, 575 (1947); *Estate of Speigel v. Commissioner*, 335 U.S. 701 (1949); *Propper v. Clark*, 337 U.S. 472, 486-489 (1949); *Ragan v. Merchants Transfer and Warehouse Co.*, 337 U.S. 530 (1949); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 674 (1950) ("This contention was rejected below, and we do not reexamine local law as applied by the lower courts."); *Williams v. United States*, 341 U.S. 97, 100 (1951); *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 204 (1956); *General Box Co. v. United States*, 351 U.S. 159, 165 (1956); *The Tungus v. Skovgaard*, 358 U.S. 588 (1959); *United New York and New Jersey Sandy Hook Pilots Assoc. v. Halecki*, 358 U.S. 613 (1959); *Sims v. United States*, 359 U.S. 108 (1959); *County of Allegheny v. Mashuda Co.*, 360 U.S. 185 (1959); *United States v. Durham Lumber Co.*, 363 U.S. 522 (1960); *Richards v. United States*, 369 U.S. 1 (1962); *Commissioner v. Busch's Estate*, 387 U.S. 456 (1967); *Appalachia Power Co. v. American Institute of Certified Public Accountants*, 80 S.Ct. 16 (1959) (Brennan, J., as Circuit Justice).

9. *Palmer v. Hoffman*, 318 U.S. 109, 118 (1943).

10. *Helvering v. Stuart*, 317 U.S. 154, 163 (1942).

11. *The Tungus v. Skovgaard*, 358 U.S. 588 (1959).

12. Several commitment provisions of this Act were upheld by the Court last Term in *Secretary, Department of Public Welfare v. Institutionalized Juveniles*, 95 S.Ct. 2523 (1979).

Department of Public Welfare of the Commonwealth the "duty . . . [t]o assure within the state the availability and equitable provision of adequate mental health and mental retardation services for all persons who need them. . . ." 50 P.S. §4201(1). As the Court of Appeals observed, the statutory standard is "need" and mere confinement is impermissible:

> That language is broad and determined: The obligation is to provide services to the mentally handicapped on the basis of need. Had the Commonwealth intended to offer only confinement without more, it would hardly have spoken in terms of "adequate . . . services."

122a-123a. Both legislative history and state case law support the conclusion that the 1966 Act grants retarded people an individual determination and provision of services adequate to their needs. 123a-130a, 156a-157a; *see* cases cited *supra* at 9-10 (state court orders mandating habilitation services). This is what the lower court required. Under Pennsylvania law, county agencies and officials, including petitioners here, must establish local retardation programs, are authorized to appropriate funds for such purposes, and have both overall and particular responsibilities under an Act which "as a whole, contemplates County participation in all facets of the state's provision of services." Court of Appeals at 129a; 50 P.S. §§4301(a) and (d). As a matter of fact, the counties' liability was established for they "have joined inextricably in the state's provision — or lack of provision — of treatment." 130a.[13]

Philadelphia, Bucks, Chester, Delaware and Montgomery county officials, petitioners here, do not dispute

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13. The factual predicate for finding the county petitioners liable for "consigning the mentally retarded to inadequate living conditions," Court of Appeals at 130a, is set forth by the District Court at 41a-46a and by the Court of Appeals at 107a and 129a-130a.

the existence of the state statutory right to habilitation. This is significant as they are charged under state law with actually providing the living arrangements and educational services which comprise the process of habilitation. The county officials argue, however, that effectuation of the right, and thus its funding, is a duty of the Commonwealth, citing 50 P.S. §4201, and that a grant distribution statute, 50 P.S. §4509(5), voids local responsibility absent sufficient funding from the state.

The Court of Appeals properly rejected these stratagems, holding that "the Counties cannot at this late date escape — by pointing the finger of responsibility elsewhere — the statutory duty to provide adequate habilitation." 130a. Retardation services under state law are a "joint venture between the Commonwealth and its subdivisions," with 50 P.S. §4509(5) not absolving the county petitioners of their duty to provide habilitation but rather "delineat[ing] nothing more than the method by which insufficient funds are to be distributed." 127a.[14]

Familiar Pennsylvania law, established in the 1966 Act and recognized and applied by the state's courts, holds that "duties — such as habilitation at institutions or community living arrangements — can be imposed" on the counties and on the Commonwealth under "the intended partnership" constructed by the legislature.[15] With this independent and sufficient state law ground, one which is entirely reasonable and correct, there is no basis or need for this Court to review the judgment below by certiorari.[16]

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14. The Court of Appeals recognized in this context that "no right is without some limitations. All that section 201 promises, and all that we hold, is that to the extent Pennsylvania maintains facilities for the mentally handicapped, those facilities must provide adequate treatment or habilitation." 127a.

15. Court of Appeals Opinion at 128a.

16. Review of an independent and sufficient state law determination would be without precedent. *See* note 7 *supra*.

II. The decision below correctly holds that Congress granted retarded people a privately enforceable right to habilitation appropriate to the individual.

Beginning in 1963, Congress enacted funding legislation to aid the developmentally disabled.[17] In 1975, aware and concerned that federal funding of state programs was insufficient to guarantee the rights of the developmentally disabled, Congress enacted the Bill of Rights provision — at issue in this case — of the current statute, 42 U.S.C. §6010 of the Developmentally Disabled Assistance and Bill of Rights Act ("Act").[18]

The Court of Appeals *en banc* correctly held that the Act grants retarded people a right to habilitation, appropriate to the individual, 114a, 139a-140a, finding this right evidenced in the terms, structure and history of the Act. Judge Broderick, the trial judge, emphasized the vast differences between mental illness, for which "treatment" is deemed appropriate, and retardation, for which training and education are appropriate. 49a-50a; *see* Court of Appeals at 109a, n. 14. *See Kremens v. Bartley*, 431 U.S. 119, 135 (1977). These non-medical educational needs of the retarded are satisfied through the process called "habilitation." 109a, n. 14.

The core of the decision below — obviously correct and not in conflict with any Court of Appeals — is that the Act imposes mandatory statutory duties on Pennsyl-

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17. Mental Retardation Facilities and Community Mental Health Centers Construction Act, P.L. 88-164, 77 Stat. 282, 88th Cong. (1963); Mental Retardation Amendments of 1967, P.L. 90-170, 81 Stat. 527, 90th Cong. (1967), extended by P.L. 91-517, 84 Stat. 1316, 90th Cong., 1st Sess. (1969). The term "developmental disabilities," defined at 42 U.S.C. §6001(7), includes such conditions as retardation, cerebral palsy, epilepsy, autism and learning disabilities.

18. 42 U.S.C. §6000 *et seq.*, P.L. 94-103, 89 Stat. 502, 94th Cong., 2d Sess. (1975), amended, P.L. 95-602, 92 Stat. 2955, 95th Cong. (1978). *See* S.Rep. 94-160, 94th Cong., 1st Sess. 28-34.

vania and that these duties may be enforced by private litigants.[19]

State Duties Under the Act. Congress has the authority, not challenged by the petitioners here, to impose duties on the States by legislatively enforcing the guarantees of the Fourteenth Amendment as well as by conditioning the provision of federal funding.[20] The developmental disabilities Act has a dichotomous structure: it is both an enforcement measure *and* a funding scheme. 114a-115a. To argue, as do petitioners, that the Act is "exclusively a funding statute,"[21] is to fundamentally and unmistakably misconstrue the plain words, history and intent of the Act.

The Act is a dual purpose enactment, both a funding provision and a separate declaration of federal statutory civil rights. Subchapter III of the Act, 42 U.S.C. §§6061-6067, creates a scheme for distribution of federal funds to states with approved plans for services to persons with developmental disabilities; if this subchapter was all Congress had enacted, the Court of Appeals might have been in error. However, Congress went further and, in Subchapter I of the Act, 42 U.S.C. §§6000-6012, imposed mandatory duties on the states to afford persons with developmental disabilities their newly expressed statutory civil rights.

The Bill of Rights. With the Bill of Rights provision, §6010, Congress established certain civil rights. By

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19. The Commonwealth and the counties have received funds under the federal statute and used them for state and local community living arrangements and services. 107a, 119a, n. 20.

20. *See, e.g., Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Miller v. Youakim*, 440 U.S. 125 (1979) (assuming the authority under funding statute); *King v. Smith*, 392 U.S. 309 (1968); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (Section 5, Fourteenth Amendment).

21. Petition of Pennhurst State School and Hospital at 11; Petition of County Commissioners at 7.

its express terms, §6010 applies to "persons with developmental disabilities" without further eligibility requirement. By contrast, for programs funded under Subchapter III, Congress required federal approval of a state plan to meet certain habilitative standards. Unless this dichotomy, recognized by the Court of Appeals, reflects the true meaning of the Act, one would be forced to attribute to Congress the senseless intention to apply the Bill of Rights only to benevolent states already providing adequate habilitation.

This interpretation is supported by other internal features of the Act and by its legislative history:

1. In 1978, Congress supplemented the Bill of Rights, providing its own statutory commentary on §6010, stating its substance to be "rights of persons with developmental disabilities" which are "in addition to any constitutional or other rights otherwise afforded to all persons."[22] *This provision would mean nothing unless the "rights" in the Bill of Rights are rights.*

2. Under §6011(a) states must develop particular habilitation plans only where the program is funded under Subchapter III; thus, where Congress intended to link a requirement to funding provisions, it explicitly did so. The Bill of Rights, the preceding section of the Act, contains no such limitation.

3. Section 6010 itself reflects the dichotomy.[23] Six minimum standards are required for the receipt of federal or state funds under §6010(3);[24] the remaining provisions — those relied upon by the Court of Appeals — contain no such limitation.

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22. *See* H.R. Conf. Rep. 94-473, 94th Cong., 1st Sess., (1975).

23. H. Conf. Rep. 94-473 at 42, reprinted at 2 U.S. Code Cong. & Ad. News 943, 961 (1975).

24. P.L. 95-602, 92 Stat. 2955, 3007, Title V, §507 (Nov. 6, 1978).

Congress intended the Act's Bill of Rights to enforce Fourteenth Amendment protections. 117a, n. 17 (reciting legislative history).[25] Subject only to the requirement that adopted measures be "appropriate,"[26] legislation enacted pursuant to Section 5 of the amendment may impose severe restraints on state action and discretion. *E.g., Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). This Court has given great deference to Congressional findings that particular actions are appropriate exercises of Congressional enforcement authority. *See Regents of University of California v. Bakke*, 438 U.S. 265, 302, n. 41 (1979) (collecting cases). In addition, in the case at bar, Congress imposed obligations on Pennsylvania under its spending clause powers to condition federal grants on provision of adequate care. 118a-119a.

The Need for Individual Determinations Strictly Limits the Court of Appeals Decision. The Court of Appeals correctly determined that the Act provides a right to habilitation to the developmentally disabled.[27] 110a, 114a. Congress established a duty on the states to provide adequate habilitation and agreed to share in the implementation of that duty. 42 U.S.C. §§6010(3), 6061-6067.

Steering a middle course between the trial court's order to close the institution and the petitioners' pleas to be left free to confine any non-dangerous disabled person no matter how inadequately, the Court of Appeals identified a "clear preference for deinstitutionalization" in the Act, 131a, and remanded "for individual determinations by the court or the Special Master, as to the appropriateness of an improved Pennhurst for each such patient." 156a. Institutionalization was not restricted:

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25. *E.g.*, 121 Cong. Rec. 16,516 and 16,519; 121 Cong. Rec. 29,820-21; H.R. Conf. Rep. No. 94-473, 94th Cong., 1st Sess. at 42, reprinted at 2 U.S. Code & Ad. News 943, 961 (1975).

26. *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 421 (1819); *Ex parte Virginia*, 100 U.S. 339, 345-346 (1880).

27. "Habilitation" is a term of art referring to non-medical education and training. *See* discussion at 7, 14 *supra*.

> For some patients, to be sure, the Act contemplates that institutionalization might be appropriate once adequate living conditions are established.

140a. The common sense principle adopted by the *en banc* court is that an individual determination for each person is needed to assure the proper conditions and setting for habilitation. 130a-140a, 156a-157a. *See* District Court Order of April 24, 1980 (placing on state and county officials duty to establish teams to make individual determinations).

The notion that structured supervised community living is the preference for the retarded, as a matter of fact, is documented in the record, inherent in the definition of habilitation[28] and in the legislation itself.[29] It is not, as petitioners extravagantly suggest, a radical mandate for uncontrolled development of unnecessary services.[30]

A Private Cause of Action is Implied Under the Act. Finding each of the *Cort v. Ash*[31] standards fully satisfied, the Court of Appeals was compelled to imply a private right of action for retarded persons under the Act. 114a-122a. The four *Cort* factors are met in this case:

> 1. *Especial beneficiaries.* No party to the litigation disputes that the retarded are among the de-

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28. *See* authorities and record references at 155a-156a.

29. *See, e.g.*, 42 U.S.C. §§6000(5) and 6010(2) and *see* discussion by Court of Appeals at 130a-140a.

30. Petition of County Commissioners at 10; Petition of Pennhurst State School and Hospital at 13. The petitioners' arguments in this regard are just so much clamjamphrie.

31. 422 U.S. 66, 78 (1975). The relevant factors in determining whether a cause of action should be implied from a federal statute are 1) whether the plaintiffs are the especial beneficiaries of the statute; 2) whether there is Congressional intent to create a private remedy; 3) whether a private remedy would further the policies of the Act; and 4) whether the cause of action is one traditionally relegated to the states. *Id.; Cannon v. University of Chicago*, 441 U.S. 677, 689, n. 9 (1979).

velopmentally disabled and thus "especial beneficiaries" of the Act. 42 U.S.C. §6001(7) (definition of developmental disabilities).

2. *Congressional intent.* Congress, recognizing that an administrative cut-off of funding would not sufficiently protect the rights of developmentally disabled individuals, made specific its intention to create a remedy in a private cause of action. The Bill of Rights section of the Act, 42 U.S.C. §6010, was added in 1975, long after the 1963 origin of the funding statute. This addition was explicitly to protect the constitutional rights recognized by the courts. *See,* S.Rep. 94-160, 94th Cong., 1st Sess. at 34. The legislative history confirms that Congress fully expected judicial enforcement of the rights enumerated in the statute, especially the right to habilitation. H.Conf. Rep. 94-473, 94th Cong., 2d Sess. at 42 ("[T]his right to appropriate treatment of developmental disability should be protected and assured by Congress *and the courts.*") (emphasis supplied); *Naughton v. Bevilaqua*, 458 F.Supp. 610, 616 (D.R.I. 1978).[32]

Congress need not expressly state that it intends a private right of action for one to be implied. *Cort v. Ash, supra*, 422 U.S. at 82. *See also, Cannon v. University of Chicago, supra*, 441 U.S. at 694. Clearly, the legislature was aware of prior litigation to enforce the right to habilitation. S.Rep. 94-160, 94th Cong., 1st Sess. at 31 (enumerating private litigation on rights of mentally retarded). It must be

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32. In addition, Congress required the states to create a system for the protection and advocacy of the individual rights of developmentally disabled persons with the authority to pursue "legal, administrative, and other appropriate remedies" for such individuals. 42 U.S.C. §6012(a)(2)(B). With such a provision in the Act, it cannot be denied that Congress expected disabled persons, and the advocacy system on their behalf, to assert both statutory and constitutional rights in private actions.

presumed that Congress had no intention of changing the means of enforcement of the rights when it had such knowledge of precedent. *Cannon, supra*, 441 U.S. at 696.

3. *A private remedy is not inconsistent with the underlying purpose of the legislative scheme.* The legislative scheme and recognition of a private right of action are consistent with one another. It is "necessary or at least helpful" to the fulfillment of the statutory purpose. *Cannon, supra*, 441 U.S. at 703. Congress specifically reiterates its desire that the states insure the protection of the legal and human rights of the developmentally disabled citizenry and the provision of services to allow them to reach their potential. 42 U.S.C. §6000(b)(1). As is the case with other civil rights statutes, the purpose of the Act is both to avoid the use of federal funds for unconstitutional purposes and to protect individuals against the effects of such practices. *See, Cannon, supra*, 441 U.S. at 704 (Title IX); *Naughton v. Bevilaqua*, 458 F.Supp. 610, 616 (D.R.I. 1978):

> [W]ithout a private right of action to focus on and redress individual past violations and deter future ones, the guarantees promised by the Act would have little meaning. A remedial scheme that addressed only institution-wide wrongs and ignored individual wrongs would be inconsistent with Congress' central concern to correct the past neglect by large institutions of individual rights and differences in needs and potential.

4. *The cause of action is not one traditionally of state law.* A cause of action to place retarded individuals to meet their habilitative needs is not an action which is traditionally one of state law. *Naughton, supra*, 458 F.Supp. at 617. In fact, such actions have traditionally been brought in the fed-

eral courts, especially in light of the federal statutory and constitutional claims which are raised in such cases. Such actions are beyond state malpractice law. *Id.*

III. Where petitioner government officials adamantly refuse to remedy their violations of respondents' rights and where protection of state and federal statutory rights would otherwise be impossible, appointment of a master with circumscribed supervisory duties does not violate principles of federalism.

With fantastic claims of being "stripped of their sovereign power,"[33] petitioners assert that the Court of Appeals' order violates principles of federalism and must therefore be reversed. A cursory analysis of the history of the case discloses the recalcitrance of the petitioners, their refusal to remedy systemic violation of respondents' rights, and the absolute necessity of an order "tailored to cure" the offending condition. *See Milliken v. Bradley*, 418 U.S. 717, 738 (1974).

As the trial court recites, 76a-78a, after its finding of liability, the District Court provided respondents several opportunities to come forward with a plan to remedy the violations found by the court or to introduce evidence on relief and implementation. *Id.* The county defendants produced no plan and submitted no evidence. The Commonwealth defendants resubmitted a "vague and indefinite" plan the court had rejected during the trial. 78a. At no time did any petitioner indicate willingness to conform its actions to the legal standards set forth by the court. *See* 150a-151a.

Not surprisingly, given the petitioners' adamantine stance, the court found "that implementation of this Order will be impossible without the appointment of a Spe-

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33. Petition of Pennhurst State School and Hospital at 16.

cial Master." 80a-81a. Without such an enforcement tool, the respondents would have found themselves with a paper victory, confined among the horrors of Pennhurst, without hope. The Court of Appeals expressed the need for workable relief vigorously:

> It is abundantly clear that providing the 1200 Pennhurst residents with a right to habilitation in the least restrictive environment will be a complex and lengthy process, probably involving monitoring, dispute resolution, and development of detailed enforcement mechanisms. Were we to preclude the trial court from resorting to a master, we would help make self-fulfilling the frequently made prophecy that courts are institutionally incapable of remedying wholesale violations of legally protected rights.

148 a.

The Special Master in no way supplants state and local retardation authorities. As the *en banc* Court of Appeals summarized the function, the Master "is to supervise all implementation efforts with the aid and assistance of all parties to the lawsuit. The defendants will thus have an opportunity to participate in the structuring of relief." 151a. In shaping the activities of the Special Master, the District Court has been even more limiting than the Court of Appeals' careful language; under the implementation orders of Judge Broderick, the Commonwealth and counties are given the responsibility for services to the disabled, with the Master acting as a stopgap and the court's eyes and ears. *E.g.*, Order of April 24, 1980 (pursuant to Court of Appeals' mandate, consolidating and amending all prior orders of the District Court).

In addition, because a state statute and a federal statute form the basis for the petitioners' obligation to provide habilitation, and because "[t]hese duties were known and consented to," any relevant federalism complaints are vitiated. 151a. Such complaints, in fact, are

considerably premature. A concrete disagreement raising federalism issues will not occur until a person is to be placed in a setting which is opposed by the state, counties or the person himself or herself. Such a placement will not occur without a full due process hearing, subject to challenge under the District Court's order of April 24, 1980. There is time enough in a real case to raise and consider the federalism issue.

Respondents may yet offer "a plan that promises realistically to work, and promises realistically to work now." *Green v. County School Board*, 391 U.S. 430, 439 (1968). Barring such a plan, a federal court must exercise its broad and flexible power to effectuate a remedial decree to meet the fact situation before it. *Milliken v. Bradley*, 433 U.S. 267 (1977).

Serious and life-threatening conditions were found by the lower court to be the responsibility of state welfare department and county officials. Evaluation of the needs of respondents and development of a plan for the future are clearly remedial and not punitive, *see Milliken v. Bradley*, *supra*, 433 U.S. at 288, and are imperative to implementation of respondents' rights. The record conclusively demonstrates the inability of the Commonwealth to act and the failure of the counties to provide mandated services. "Judicial authority enters only where local authority defaults."[34] See *Milliken v. Bradley*, *supra*. A more persuasive case of such local default could hardly be imagined.[35]

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34. *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 15 (1971).

35. Respondents fail in their struggle to draw this case under the rubric of *Rizzo v. Goode*, 423 U.S. 362 (1976), and *Bell v. Wolfish*, 441 U.S. 520 (1979). In both those cases, lower courts were found to have entered orders far beyond the bounds of any cognizable rights. Here, the Court of Appeals has done nothing more than uphold a mechanism for directly implementing state and federal statutory rights, rights which, at least under state law, are not disputed by the five county petitioners. In *Rizzo* and *Bell*, unlike this case, there was no recalcitrance by government officials in hewing their actions to the limits of the law.

IV. Where a unitary plaintiff class is certified for the purpose of determining liability, and where procedural alternatives to decertification are available to resolve any possible problem, and there is no substantial conflict regarding plaintiffs' claims, there is no abuse of discretion by the Court of Appeals in declining to decertify the class.

One petitioner here, standing alone among the others, the Pennhurst Parents-Staff Association at No. 79-1489, challenges the Court of Appeals' refusal to decertify the plaintiff class on the ground that various class members' interests were antagonistic. The argument is patently friviolous and without merit. It is also an attempt to obtain review here of another judgment of the Court of Appeals regarding which no certiorari petition has been filed.

The plaintiff class includes all persons who are or may become inmates of the Pennhurst institution. As the Court of Appeals observed, their interests were common in every relevant respect:

> Plainly, the violations of federal and state law which the trial court found and which we have affirmed, are violations affecting all of the plaintiffs, not simply those who wish a transfer from Pennhurst. At the liability stage, therefore, important questions of law were common to all members of the class. Thus, regardless of any subsequent disagreement among class members as to the appropriate relief, we can think of no persuasive reason to have fractionated the class at that early juncture.

144a (citations at 145a-146a omitted). Any possible prejudice to the objecting group of Pennhurst staff and parents was eliminated by the Court of Appeals' direction to utilize "procedural alternatives, short of decertification, [which] are available to the trial court on remand in implementing individuated relief." 146a. By order of Feb-

ruary 22, 1980, the District Court did permit the Parents-Staff Association to intervene as a party plaintiff and it has participated in all implementation proceedings formally, as it previously had informally.

In *Halderman v. Pennhurst State School and Hospital*, 612 F.2d 131 (3d Cir. 1979), *not the case before this Court*, the Court of Appeals rejected the attempt of the Pennhurst Parents-Staff Association to intervene, post-judgment, in the litigation on the grounds that its interests were not properly represented. No certiorari petition regarding that judgment[36] has been filed, with the present petition serving as an ill-considered and inappropriate effort to elude its consequences.

The correctness of the decision below is further supported in that:

> 1. No persons, including parents and institutional employees, have the right to subject another to barbarous, inhumane and illegal conditions or to deny an individual determination of what services are proper. *See Parham v. J.R.*, 99 S.Ct. 2493 (1979). The Pennhurst Parents-*Staff* Association includes in its membership employees at Pennhurst and defendants in this case. The employees' union has contributed substantially to the legal representation of the group. Deposition of Edward Keller, AFSCME. This petitioner for certiorari cannot represent the inmates' interests without overwhelmingly unacceptable conflict.
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> 2. *Hansberry v. Lee*, 311 U.S. 32 (1940), establishing the propriety of class actions, does not conflict with the Court of Appeals' decision here which recognizes, as does *Hansberry*, that class actions must include proper class representatives.

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36. The opinion of the Court of Appeals, No. 78-1999, is reproduced as Appendix E to the Petition of Pennhurst Parents-Staff Association at 211a-217a of its appendix.

The organization of staff and parents ultimately seeks an improved Pennhurst and an opportunity to keep residents in the institution. This is the very relief ordered by the Court of Appeals. There was no abuse of discretion in the affirmance of the limited class certification and no purpose would be served by granting review on this issue.

V. There is no conflict with any decision of this Court or among the courts of appeals.

Not one of the issues sought to be reviewed involves a conflict with any decision of this Court or any Court of Appeals.[37]

A. The Pennsylvania Mental Health and Mental Retardation Act, interpreted below consistently with state and federal case law, has not been subject to any conflicting interpretation.

B. The Developmentally Disabled Assistance and Bill of Rights Act is interpreted by the court below with regard to the substantive rights of the retarded for the first time in a Court of Appeals.[38] The interpretation makes sense. It is and has been supported by the United States, a party plaintiff below, including the agency charged with the Act's enforcement.

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37. One petitioner, the Commonwealth in No. 79-1404, alone among the others, raises as its third issue the standing of the United States to intervene as plaintiff. No decision of a court of appeals denies such a *right to intervene*. *See* note 38 *infra*. This is not a proper issue for this Court because its resolution has "no effect on the merits of the appeal." Court of Appeals at 99a.

38. In cases involving the authority of the United States to initiate litigation, as the sole plaintiff on behalf of institutionalized persons, the Fourth and Ninth Circuits held that the United States lacked authority to sue, and in *dicta*, commented on the nature of the developmental disabilities statute, but did not discuss the rights of the retarded under the Act. *United States v. Solomon*, 563 F.2d 1121 (4th Cir. 1977); *United States v. Mattson*, 600 F.2d 1295 (9th Cir. 1979).

C. No conflict is present on the questions of the scope of a federal court's remedial authority over recalcitrant litigants where implementation of its orders would be "impossible" without a master or on the question of the class certification.

VI. The Questions Presented are not appropriate for review.

While the right of retarded persons to live and learn in the community and to be free from brutal dehumanizing unnecessary confinement is undoubtedly an issue of great importance, the Questions Presented by petitioners in this case provide no opportunity for appropriate consideration by this Court.

Pennsylvania state statutory and case law is the basis for an independent and dispositive finding by the lower court of a right to habilitation. This Court has not and should not undertake to resolve the disagreement over local law between the petitioners and the lower court.

Assuming *arguendo* that petitioners' claim that the developmental disabilities Act does not create a broad right to habilitation for the retarded has some arguable validity, there can nevertheless be no doubt that in *this case*, on *this* record, numerous violations of Pennsylvania's obligations under the Act are present. It would involve this Court in rendering an impermissible advisory opinion for it to review the federal statutory question in the absence of a legitimate factual footing.

The spectre of "federalism" is one convenient for state governmental petitioners to raise. Resolution of the issue turns on the factual questions of the impossibility of implementation without strong remedial measures, the refusal of the petitioners to come forward to comply with the mandates of the law and the history of default by the responsible government officials. Such factual questions are not properly resolved by this Court.

CONCLUSION

For the above reasons, respondents Terri Lee Halderman, *et al.*, respectfully submit that the petitions for certiorari in Nos. 79-1404, 79-1408, 79-1415 and 79-1489 should be denied. Only if any of these petitions is granted should the conditional cross-petition in No. 79-1414 be granted; otherwise, it should be denied.

Respectfully submitted,

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